SUPREME COURT OF NOVA SCOTIA

Citation: *Ryan v. Whitehead*, 2018 NSSC 102

Date: 20180314
Docket: Hfx No. 469663
Registry: Halifax

Between:

Denise Jacqueline Ryan

Plaintiff

v.

Darlene Whitehead

Defendant

SUMMARY JUDGMENT ON PLEADINGS

Judge:	The Honourable Justice Christa M. Brothers
Heard:	March 6, 2018, in Halifax, Nova Scotia
Final Written Submissions:	March 9, 2018
Written Release of Decision	April 27, 2018 **(Orally: March 14, 2018)**
Counsel:	Patrick Connors, for the plaintiff Derek B. Brett, for the defendant

Brothers, J.: (Orally)

OVERVIEW

[1] This claim arises from an attempted business venture between the parties. The plaintiff and defendant are sisters. The plaintiff alleges the two attempted to start a business together. After the plaintiff moved back to Nova Scotia in 2013, the sisters discussed opening this new business. The plaintiff ran a company in Alberta which produced and supplied food products to grocery stores. The defendant had experience as a cook and running a commercial kitchen. The allegation is the two decided to combine their respective skills to run the new business registered as Cooks Corner. The business never became a going concern. This action arises from the failed business venture and the alleged failure by the defendant to repay monies loaned to her for the purpose of this business venture and for a vacation.

[2] The defendant brings this motion for summary judgment on the pleadings.

[3] The plaintiff says the agreement between her and the defendant included the following terms:

1. The plaintiff would transfer $40,000 to the defendant to finance the business.

2. The two would equally share the legal, incorporation, and registration fees incurred to set up the business.

3. If the business was profitable, the company would repay the plaintiff the $40,000 and half of the legal, incorporation, and registration fees.

4. If the business was abandoned, the defendant would repay the $40,000 and contribute 50% of the incorporation costs of $770.83.

5. Lastly, the plaintiff says she loaned the defendant $1,000 so that Ms. Whitehead and her husband could take a trip to the Dominican Republic. She says the defendant agreed to repay this money.

RULES

[4] The defendant seeks summary judgment on the pleadings pursuant to Civil Procedure Rule 13.03, which provides:

> Summary judgment on pleadings
>
> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
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> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[5] The defendant correctly states the test to be met. There is a heavy burden upon the defendant advancing this motion. The burden is high since a successful motion results in the plaintiff being prevented from having an opportunity to have her case assessed at the trial. I will review briefly the test for summary judgment on the pleadings.

TEST FOR SUMMARY JUDGEMENT ON THE PLEADINGS

[6] The court in *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd,* 2010 NSSC 25, set out the test for summary judgment on the pleadings:

> 10] A motion pursuant to Rule 13.03, on the pleadings, is analogous to the "application to strike" under Rule 14.25 of the former 1972 Civil Procedure Rules. Both Applicants have put forward the well established test for an application to strike in their written submissions, the applicability of which was not challenged by Carson. They assert, and I agree, that the implementation of the current Civil Procedure Rules on January 1, 2009, has not eroded the applicability of earlier case authorities. This approach has been recently endorsed by this Court in *Murphy v. Murphy* 2009 NSSC 138, where Warner, J. writes at para. 26 as follows:
>
>> The test in new CPR 13.03 (old CPR 14.25) ‑ summary judgment on pleadings, is that the pleading discloses no cause of action [13.03(1)(a)], or the claim is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]. In *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, the

> Supreme Court wrote that the question was: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of claim disclosed no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck.
>
> [11] The Court of Appeal has recently re-affirmed the rule for the striking of pleadings, which I find is still applicable to motions under new Rule 13.03. Writing for the Court in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, MacDonald, C.J.N.S. writes at para. 17 as follows:
>
> > [17] Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.
>
> [12] The Court further, reaffirms the standard as articulated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 259, writing at para. 18 as follows:
>
> > [18] In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1) (a), they must appear to be either "certain to fail" (2007 NSCA 70 at para.13) or "absolutely unsustainable" (*CGU Insurance Co. of Canada v. Noble,* 2003 NSCA 102 at para. 13).

[7] I am further guided by the direction given in *Cragg v. Eisener*, 2012 NSCA 101, where Saunders, J.A. writing for the court, stated at para. 9:

> [9] The approach taken when deciding a motion for summary judgment "on the pleadings" is different. There, the judge's inquiry is limited to an examination of the pleadings. No evidence on the motion is permitted. The "test" is drawn from language found in the jurisprudence involving motions to strike out pleadings. In other words, to grant summary judgment on the pleadings, the judge must be satisfied that the claim (or defence, as the case may be) "is certain to fail" or "is absolutely unsustainable" or "discloses no cause of action or basis for a defence". . . .

ANALYSIS

[8] The defendant argues that the test for summary judgment on the pleadings is met on three grounds:

1. The application of the *Statute of Frauds*, R.S.N.S. 1989, c. 442

2. The application of the *Limitation of Actions Act*
3. Lack of standing

STATUTE OF FRAUDS

[9] The defendant argues that the *Statute of Frauds* requires a written contract prior to any claim being brought. She relies on s. 7(e) of the *Statute of Frauds*. The section reads:

> Action upon agreement
>
> 7 No action shall be brought . . .
>
> (e) upon any agreement that is not to be performed within the space of one year from the making thereof,
>
> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

[10] There is no written contract between the parties. The pleadings allege an oral contract. The defendant argues that the alleged oral agreement between the parties was not and could not be performed within the span of a year and therefore the *Statute of Frauds* applies. The defendant argues that the oral agreement contemplated a continuing business enterprise, and therefore exceeds the permissible one-year period in the *Statute of Frauds*.

[11] The defendant argues that even if suitable premises for the business could have been located within a year, the requirement to "invest" the money in the business could be interpreted to include the following:

1. Investing in developing a new product; or,
2. Paying for repairs to the premises caused by the company's operations; or,
3. Purchasing or leasing new kitchen equipment; or,
4. Obtaining the rights to a recipe needed to produce new products; or,
5. Hiring additional kitchen staff; or,
6. Paying for off-site training of incoming kitchen staff; or,
7. Covering additional utility costs as the company expanded; or,
8. Paying the rental or leasing costs of vehicles needed to distribute company products; or,

9. Paying for additional legal fees that may arise as company operations expand to other provinces; or,
10. Paying additional accounting fees that arise as company operations expand.

[12] The defendant argues these types of capital investments or capital needs could easily occur well after one year of an operation. She says that the agreement between the parties could therefore not be performed within one year, and therefore was required to be in writing pursuant to the *Statute of Frauds*.

[13] The defendant also argued that partial performance of the contract was not pleaded to relieve the plaintiff of the application of the *Statute of Frauds*. The defendant argues the *Statute of Frauds* bars the plaintiff from seeking relief and summary judgment on the pleadings on that basis is necessary.

[14] The plaintiff raises the following cases to demonstrate that her cause of action is not certain to fail on this basis:

- *Mott v. Trott*, [1943] SCR 256
- *Wintermute v. Moulton*, 1923 CarswellNS 24, [1922] N.S.J. 11
- *Annand v. Peter M. Cox Enterprises Ltd.,* 1992 CanLII 4666, [1922] N.S.J. 23
- *Greennough Estate (Re)*, 2008 NSSC 355.

PERFORMANCE WITHIN A YEAR

[15] While an interesting and well-articulated argument, I am unable to accept the defendant's position. It is clear and the defendant accepts, that the *Statute of Frauds* does not require a written contract, if the contract, or one side of the contract can possibly be performed within a year. The defendant argues that this contract could not and was not anticipated to be performed in a year. With respect, my role is not to embark on a fact-finding exercise in relation to that question. Evidence is not permitted on this motion.

[16] The defendant may be successful at trial on this issue, that remains to be seen, and I am making no comment in that regard; however, the application of the *Statute of Frauds* is not so clear as to make this cause of action certain to fail or absolutely unsustainable. The plaintiff's claim that the contract can be performed or is not incapable of being performed within a year raises a viable cause of action. Even an agreement of indefinite duration that can be performed within a year is not

covered by the *Statute to Frauds* as set forth in the above noted case law, and in particular in *Annand v. Peter M. Cox Enterprises Ltd., supra.*

[17] It is not plain and obvious that the alleged contract could not have possibly been performed within a year. The case law directs that if an agreement may possibly be performed within a year the *Statute of Frauds* does not apply (see *Claussen Walters & Associates Limited v. Murphy,* 2001 NSSC 105). I refer to the comments in *Wintermute v. Moulton*, 1923 CarswellNS 24, 56 N.S.R. 190 (S.C.), (affirmed by the Supreme Court *in banco*), where Harris, C.J. said at 192:

> It will not, I suppose, be questioned that the guarantee would only be binding so long as the plaintiff was owner of the share. When he sold or if the ship should at any time be lost, the guarantee would be at an end. The contract therefore seems to be one which might possibly be performed within one year.
>
> It is well settled that the *Statute of Frauds* does not apply to contracts which “may possibly be performed within the year”; nor does it apply to contracts which may be “performed within the year on one side only though they cannot be performed within the year on the other side.” See *Leake* on Contracts, p. 172.
>
> In *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D., at page 296, Bowen L. J., said: “An agreement which is to be performed on one side within the year does not require to be in writing under the *Statute*.”
>
> In 7 *Halsbury’s Laws of England*, p. 366, it is stated that: “The *Statute* has no application to contracts for an executed consideration or where the contract is to be entirely executed by one party within the year, nor is a contract under the terms of which it is possible that one of the parties may wholly perform his part of the contract within the year although the performance by the other party extends over several years.”

[18] I also refer to *Richmond Wineries Western Ltd. et al. v. Simpson et al.*, [1940] 2 S.C.R. 1 at 17 which stands for the proposition that the *Statute of Frauds* applies only to an agreement which, by its very terms, is incapable of being performed. This is not clear on the face of the pleadings in this case.

PART PERFORMANCE

[19] Furthermore, if the plaintiff could perform her obligation under the oral contract within a year, that would be part performance. On the face of the pleadings, the transferring or loan of the $40,000 was done within a year. Accepting the pleadings as true, we know the plaintiff performed her obligations under the contract within a year and paid the $40,000. I quote from the Notice of Action and Statement of Claim:

9. After moving back to Nova Scotia in 2013, Jackie had discussions with the Defendant about opening a new business.

20. The discussions and agreement outlined in paragraphs 6 to 12 were had and made through oral conversations between the Defendant and Jackie. They did not put their agreement in writing.

21. On or about March 18, 2013, Jackie and the Defendant attended a Scotiabank in Nova Scotia. The Defendant opened a new bank account at Scotiabank in her name only. After the Defendant opened the new bank account, Jackie transferred the Defendant $40,000.00 from her Scotiabank account into the Defendant's new Scotiabank account.

22. In or around April 2013, Jackie and the Defendant went to a lawyer to incorporate Cooks Corner. Jackie paid the lawyer $96.25 in legal fees.

[20] The defendant argues that in order to constitute part performance, the defendant must have done something. Before the hearing of the motion, no case law was provided to me to support this contention. On March 9, 2018, counsel for the defendant provided for consideration, what he described as a case addressing the issue of part performance. I considered the additional information, but for the following reasons find it does not assist the defendant.

[21] The so-called case submitted was a brief filed by the plaintiff in *101252 P.E.I. Inc v. Brekka*. The actual case was originally heard by Wood, J. and reported at 2013 CarswellNS 687, 2013 NSSC 289. The decision was upheld on appeal at *Brekka v. 101252 PEI Inc.,* 2015 CarswellNS 690, 2015 NSCA 73.

[22] *Brekka* dealt with an alleged oral contract concerning land. This is not similar to the case before me.

[23] Section 7(d) of the *Statute of Frauds* was at issue in that case not s. 7(e). Wood, J. held that the evidence adduced to prove part performance of an oral contract concerning land was not sufficient and did not meet the legal test, he found this after hearing evidence. This case assists in demonstrating that such cases, when in dispute, can not be decided on a motion for summary judgment on the pleadings

[24] The question before me is whether it is plain and obvious on the face of the pleadings that the alleged contract could not possibly be performed within one year, I cannot reach that conclusion.

[25] The question of the application of s. 7(e) of the *Statute of Frauds* cannot be answered in the affirmative based on the pleadings. Accepting the pleadings to be true, the plaintiff performed her obligations of the agreement within one year.

[26] Consequently, summary judgment on the pleadings on this basis is denied.

The *Limitation of Actions Act*

[27] The defendant argues that the *Nova Scotia Limitation of Actions Act* S.N.S. 2014, c. 35, s. 8(1)(a) precludes claims brought after two years from the date on which the claim is discovered.

> General rules
>
> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.
>
> …

Demand obligations

14 In the case of a claim in relation to a default in performing a demand obligation, the first day on which there is a failure to perform the obligation, once a demand for performance has been made, is

(a) for the purpose of clause 8(1)(b), the day on which the act or omission on which the claim is based occurs; and

(b) for the purpose of clause 8(2)(a), the day on which the injury, loss or damage occurs.

[28] The Notice of Action and Statement of Claim was filed by the plaintiff on October 23, 2017. The defendant states that while the plaintiff alleges she became aware of the existence of the four elements in October 2016, her pleadings do not support this. The defendant says, at para. 16 of her brief:

> . . . However, Plaintiff's allegations within her Statement of Claim set forth a business relationship that could at best have been termed one–sided, with allegations sufficient to show that Plaintiff ought to have known of the existence of these elements far sooner.

[29] The Notice of Action pleads the plaintiff transferred $40,000 to the defendant on or about March 18, 2013. The company was incorporated on or about April 12, 2013. The defendant alleges that the plaintiff ought to have known of an "injury, loss or damage" as of April 12, 2013, when the corporation was formed, the plaintiff paid the full cost of the incorporation, and the defendant did not pay half of the cost.

[30] I cannot and should not undertake the exercise asked of me by the defendant. I must assume all the allegations in the Notice of Action and Statement of Claim are true. Any discoverability arguments are not supported on the face of the plaintiff's pleadings and therefore summary judgement cannot be granted on this basis. In this matter, I cannot rule on discoverability questions which require evidence.

[31] The Notice of Action and Statement of Claim says the following about when the cause of action arose:

> 29. In or around July 2016, after it appeared to Jackie they were no longer pursuing the business, Jackie approached the Defendant and asked her to repay the $40,000.00 loan.
>
> 30. At that time, the Defendant agreed to repay the $40,000.00 loan. However, the Defendant indicated she did not have the financial ability to repay

> Jackie at that time but would provide Jackie with post-dated cheques to repay Jackie over time.
>
> 31. The Defendant never provided Jackie with post-dated cheques and the Defendant has never paid back Jackie any amount owing on the $40,000.00.
>
> 32. In October 2016, the Defendant went to Jackie's residence. The Defendant said she would not be doing any business with Jackie in relation to Cooks Corner, that she did not owe Jackie any money, and she was going to spend and enjoy the $40,000.00.

[32] At this stage, on this motion I must accept these statements to be true. Consequently, I cannot find it plain and obvious that the claim is statute-barred.

[33] Section 8(1)(a) of the *Limitation of Action Act* establishes the basic limitation period to bring a claim as two years from the day a claim is discovered. Section 8(2) sets forth how to establish a discovery date. Section 14 of the *Act* establishes a limitation period starts based on a failure to perform a demand obligation.

[34] On the face of the pleadings and in the context of this motion, I must accept that both the loan of $40,000 and $1,000 were either demand obligations or the former is a contingent loan.

[35] The plaintiff demanded payment of the loans in October 2016. Consequently, the loans became due then, and the limitation period began to run. The Notice of Action and Statement of Claim was filed within two years of that date. Also, the pleadings support the view that the $40,000 loan was a contingent loan. The contingency was either that the company was profitable, or it was abandoned. The plaintiff pleads she did not know the defendant would not intend to live up to her end of the bargain until July 2016. Consequently, the claim is not certain to fail or absolutely unsustainable.

[36] In addition, the fact that the agreement is pled as a demand loan does not, on the face of the pleadings, mean a violation of the *Statute of Frauds*. The only issue would be if, on the face of the pleadings, the agreement was not able to be performed within a year.

STANDING

[37] The defendant argues the plaintiff lacks standing to seek repayment of the alleged monies advanced to the defendant to finance a vacation. The defendant says the Notice of Action and Statement of Claim does not allege these monies were to be repaid. This argument is entirely answered by para. 44 of the Notice of Action and Statement of Claim:

> 44. Jackie agreed to provide US $1,000.00 to the Defendant and Mr. Whitehead and the Defendant and Mr. Whitehead agreed to repay Jackie.

UNJUST ENRICHMENT

[38] The plaintiff also pleads unjust enrichment. This issue was not raised by the defendant, but only by the plaintiff in response. The defendant's counsel candidly said he did not know if this equitable cause of action yields to the *Statute of Frauds*. Given that this was not argued, and the defendant did not seek summary judgement on the pleadings in relation to this cause of action, I will not deal with the issue.

COSTS

[39] Costs are in the discretion of the court. Tariff C applies. Both parties sought costs, if successful, paid forthwith. Both parties declined to make submissions on quantum and left this to the court's discretion. Given the plaintiff's success and that this motion was argued in a half day, I award $750 to the plaintiff payable forthwith.

Justice Christa M. Brothers